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No. 08-183

Supreme Court, U.S.
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In The
Supreme Court of the United States

HERITAGE COAL COMPANY, LLC,
formerly Peabody Coal Company, LLC,
Petitioner,

v.

AMBROSIA LAND INVESTMENTS, LLC, formerly Wilke Window & Door Company, Inc. and ILLINOIS MINE SUBSIDENCE INSURANCE FUND,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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Petitioner, Heritage Coal Company, LLC, formerly Peabody Coal Company, LLC, submits this Reply to the Brief in Opposition of Illinois Mine Subsidence Insurance Fund on the Petition for Writ of Certiorari:

ARGUMENT

I.

Not surprisingly, Respondent is unable to defend, with legal authority, the Court of Appeals' unprecedented and unwarranted extension of its appellate jurisdiction in this case. On the other hand, it is surprising that Respondent would suggest that Petitioner "does not dispute" the authorities cited by the Seventh Circuit, which it used in concluding it was entitled to decide an issue not raised in the district court, where the issue involves a purely legal question of statutory interpretation and the pertinent record is fully developed.[1] Resp't Br. 2, Pet. App. 17a-18a. Unlike the present case, in each of the cases relied upon by the lower court, the arguments upon which the Court of Appeals relied were at least raised on appeal. West Allis Mem'l Hosp. v. Bowen, 852 F.2d 251 (7th Cir. 1988); K and N Eng'g, Inc. v. Bulat, 510 F.3d 1079 (9th Cir. 2007); Norfolk & S. Ry. Co. v. Basell USA Inc., 512 F.3d 86 (3rd Cir. 2008). Even then, the Courts in those cases declined to consider the new argument raised on appeal in two of those three cases.

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[1] It should also be noted that this case did not present a case of pure statutory construction. As the lower court itself acknowledged, applicability of the Statute of Repose is a question of law, the resolution of which is grounded in fact. Pet. App. 7a.

West Allis Mem'l Hosp., 852 F.2d at 258 and Norfolk & S. Ry. Co., 512 F.3d at 97.

The additional cases cited by Respondent are equally unavailing. In Stetson v. Howard D. Wolf & Associates, 955 F.2d 847, 848 (2nd Cir. 1992), the Court actually accepted the argument advanced by the appellee on appeal in affirming the district court. Likewise, in Trierweiler v. Croxton & Trench Holding Corp., 90 F.3d 1523, 1538 (10th Cir. 1996), the specific grounds relied upon by the Court had been advanced on appeal.

In this case, the lower court clearly overstepped the bounds of its discretionary appellate jurisdiction. Frankly, Petitioner cannot criticize Respondent for its inability to justify the lower court's action. There is no authority to support it. Neither this court, nor any other federal appellate court appears to have stretched its appellate jurisdiction to the limits the lower court did here.

II.

However, Petitioner does criticize Respondent's futile attempt to defend the Court of Appeals' decision on the merits. Indeed, Respondent only references the same case relied upon by the lower court, Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N.E. 335 (1904), and repeats the same error of the lower court in suggesting that Lloyd holds that it is only the "removal of coal" which subjects the coal operator to liability for resulting subsidence. Resp't Br. 3. That single phrase was not the Court's holding, nor does it accurately state the nature of a subsidence cause of action.

It is not just the removal of the coal, but where the surface owner "is deprived of the necessary support for his land" that liability attaches. Lloyd, 210 Ill. at 468. The removal of coal was Petitioner's right. The failure to provide adequate support was the breach of duty, giving rise to the cause of action. Of course, the formation of that pillar support, and its failure, is the very construction-related activity making applicable the Statute of Repose.

It is wrong to simply extract a phrase from another judicial decision in order to reach a desired result. Yet, that is exactly what has happened in the present case, and without the benefit of input from the parties either in the trial court or even on the appeal: The adversarial process is designed to refine the issues, identify the applicable law and flush out the proper legal analysis. In this case, the adversarial process was not just ignored. The lower court rejected it outright. Pet. App. 16a.

C.S. Johnson Co. v. Champaign Nat'l Bank, 126 Ill.App.3d 508, 467 N.E.2d 363 (1984) is also of no aid to Respondent in defending the appellate court's decision. Resp't Br. 1, n. 1. In that case, defendants did not sustain their burden of proof on the Statute of Repose defense, as they presented no evidence or arguments that they in fact designed, planned, supervised, observed or managed the construction on their property. Id. at 511. In this case, Petitioner presented such evidence. Indeed, as Respondent now concedes, Petitioner "prevailed" in establishing that the underground mine constituted "construction of an improvement to real property within the meaning of the" Statute. Resp't Br. 2.

Respondent also cannot distinguish the holdings of Am. Nat'l Bank & Trust Co. of Chicago v. Booth/Hansen Associates, Ltd., 186 Ill.App.3d 865, 542 N.E.2d 925 (1989), Commonwealth Edison Co. v. Walsh Const. Co., 177 Ill.App.3d 373, 532 N.E.2d 346 (1988) and Cont'l Ins. Co. v. Walsh Const. Co. of Ill., 171 Ill.App.3d 135, 524 N.E.2d 1131 (1988) simply because the defendants in those cases were "hired for" the construction process, and were not owners of the land. The Construction Statute protects "anyone who engages in the enumerated activities" in the Statute, Hausman v. Monarch Mach. Tool Co., 997 F.2d 351, 354 (7th Cir. 1993), including owners of land. Wright v. Bd. of Educ. of City of Chicago, 335 Ill.App.3d 948, 956-957, 781 N.E.2d 386 (2002).

Indeed, for the very first time since the initiation of this litigation, Respondent now asserts the justification newly-fabricated by the lower court in concluding that Petitioner was sued merely in its status as a landowner. Respondent never advanced such a position in the trial court or on appeal. In fact, in Respondent's Complaint in the district court, Respondent did not sue Petitioner as a landowner. Rather, Respondent properly pleaded that in mining and removing coal, Petitioner "failed to provide sufficient support for the surface property." ROA 23 par 8.

The District Court found, and even the appellate court recognized, that the mine constituted construction of an improvement, and even that the formation of the support pillars of the mine constituted construction, and their failure was the cause of subsidence. The district court's judgment was correct

and should not have been disturbed, especially in the way the Court of Appeals did here.

CONCLUSION

This Court should grant the Petition and review the case. In the alternative, this Court should affirm the District Court's judgment or grant, vacate and remand for further proceedings.

Respectfully submitted,

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